

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Wesley Gadsden,

Complainant,  
vs.

**FINDINGS OF FACT,  
CONCLUSIONS AND ORDER**

Representative Mary Kiffmeyer,  
  
Respondent.

The above-entitled matter came on for an evidentiary hearing on October 27, 2010, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (presiding judge), Barbara L. Neilson, and Gary Hall. Pursuant to an agreement of the parties, the panel made its determination based on the record created at the October 12, 2010, probable cause hearing. No separate evidentiary hearing was held. The parties presented argument to the panel on October 27, 2010, at the conclusion of which the OAH record closed.<sup>1</sup>

Wesley Gadsden (Complainant) appeared on his own behalf without counsel.

David Asp, Lockridge, Grindal, Nauen P.L.L.P., appeared for Rep. Mary Kiffmeyer (Respondent).

**STATEMENT OF THE ISSUES**

1. Does the Respondent's "legislative review" disseminated with the *West Sherburne Tribune* in June 2010 constitute campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2?

2. Did the Respondent violate Minn. Stat. § 211B.04(b), by failing to put a disclaimer on the legislative review indicating that her campaign committee paid for it?

Based upon the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

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<sup>1</sup> After the record closed, counsel for the Minnesota Newspaper Association filed a request to submit a short legal memorandum as amicus curiae, and he attached its proposed submission. The panel declines to reopen the record to receive this submission and has not considered it in reaching its determination.

## FINDINGS OF FACT

1. The Respondent is the incumbent state representative in House District 16B.

2. The Complainant is the chair of the Sherburne County DFL party.

3. The 2010 legislative session ended on May 17, 2010.

4. The Respondent filed with the Secretary of State for re-election to her legislative seat on May 19, 2010.<sup>2</sup>

5. At about this time the Respondent began working with a staff media writer for the House Republican Caucus to prepare a document that she called the "2010 Legislative Review."<sup>3</sup> The staff writer drafted the document, and the Respondent chose a tabloid format for the document.<sup>4</sup> It is designed to be printed on both sides of a sheet of paper roughly 22 by 16 inches; when folded in half, it has four pages of text that are each about 11 by 16 inches, similar to a newspaper.<sup>5</sup>

6. Although the Legislative Review contains a column on the front page entitled "Letter from Rep. Kiffmeyer" that is signed by the Respondent, the remainder of the document is designed to resemble a newspaper, containing a variety of "articles" that refer to the Respondent and her legislative work in the third person. It also contains numerous photographs of the Respondent, graphics from the Minnesota Management and Budget office describing the state's general fund, and other graphics illustrating the predicted growth in government spending over the next three years.<sup>6</sup>

7. A draft of the document was emailed to the Respondent on June 1, 2010.<sup>7</sup> She suggested some revisions, and the document was finalized on or shortly after that date.<sup>8</sup>

8. On June 1, 2010, a DFL candidate filed with the Secretary of State to run against the Respondent for the seat in House District 16B.<sup>9</sup>

9. The final version of the document contains a photograph of the Respondent above the fold with the quotation "We must live within our means." Across the top are references to "articles" on other pages, such as "Kiffmeyer a

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<sup>2</sup> <http://candidates.sos.state.mn.us/CandidateFilingResults.aspx?county=0&municipality=0&school district=0&hospitaldistrict=0&level=1&party=0&federal=False&judicial=False&executive=False&senate=False&representative=True&title=&office=0&candidateid=0>

<sup>3</sup> Testimony of Mary Kiffmeyer.

<sup>4</sup> *Id.*

<sup>5</sup> Attachment to Complaint.

<sup>6</sup> Ex. A.

<sup>7</sup> *Id.*; Ex. B.

<sup>8</sup> Test. of M. Kiffmeyer; Ex. A.

<sup>9</sup> <http://candidates.sos.state.mn.us/CandidateFilingResults.aspx?county=0&municipality=0&school district=0&hospitaldistrict=0&level=1&party=0&federal=False&judicial=False&executive=False&senate=False&representative=True&title=&office=0&candidateid=0>

friend of taxpayers--Page 2," "Assessing our wants vs. needs--Page 3," "Continuing work to fix Green Acres--Page 3" and "Protecting small businesses--Page 4." Across the bottom of the front page is a graphic in large font size advising the reader to "connect" with the Respondent at [www.kiffmeyer.org](http://www.kiffmeyer.org), which is her campaign website. Inside pages also list, in smaller font, the telephone number and email address of the Respondent's legislative office, and her page on the legislature's website.

10. The design of the "Legislative Review" strongly resembles the home page of the Respondent's campaign website. The "masthead" of the "Legislative Review" is identical to the logo on the campaign website. The quote emphasized on the front page of the "Legislative Review" is "We must live within our means." The quote on the home page of the campaign website is "Government must live within its means!" The "Legislative Review" contains a box graphic that lists the Respondent's top priorities as: Personal Freedom, Low Taxes, Limited Government, Equal Opportunity, Effective Education, Private Health Care, Right to Life, Right to Bear Arms, Tough on Crime, Structural Reform, and Marriage of One Man and One Woman. The home page of the campaign website states that the Respondent believes in: Personal Freedom, Low Taxes, Limited Government, Equal Opportunity, Effective Education, Private Health Care, Low Government Spending, Right to Life, Marriage of One Man and One Woman, Right to Bear Arms, and Photo ID.

11. The "articles" within the document describe the Respondent's work on a variety of legislative matters. The document includes some discussion of her general policy positions and likely initiatives during the 2011 session. It also levels criticism against the "Democrat majority's continual efforts to increase spending and raise taxes" and accuses the majority of "tunnel vision." There is no reference, however, to the coming election; no encouragement to vote for her; and no mention of any opponent. There are several references to the need to continue working on the Respondent's priorities in the next legislative session.<sup>10</sup>

12. The Respondent's campaign committee paid to have the Legislative Review printed and distributed as an insert to the *West Sherburne Tribune* on or about June 19, 2010.<sup>11</sup> The document does not contain a disclaimer identifying the Respondent's campaign committee as the organization that prepared or paid for it.

13. On September 28, 2010, the *West Sherburne Tribune* published a letter to the editor from a resident in Becker, Minnesota, who complained that the piece appeared to be "a thinly veiled piece of campaign literature disguised as a 'Legislative Review,' produced and disseminated a[t] Tax Payer expense. If the other legislators follow Mary's example, the cost to taxpayers is hundreds of thousands of dollars."<sup>12</sup>

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<sup>10</sup> Ex. A.

<sup>11</sup> Test. of M. Kiffmeyer; Ex. D.

<sup>12</sup> Attachment to Complaint.

14. In response to this letter to the editor, the Respondent's campaign manager wrote his own letter to the editor, stating that the "Legislative Review" was not printed or distributed at taxpayer expense.<sup>13</sup>

15. The Respondent's campaign committee reported the expenses of printing and distributing the Legislative Review to the Campaign Finance & Disclosure Board. Half of the total expense was reported as a noncampaign disbursement, pursuant to Minn. Stat. § 10A.01, subd. 26(6). Noncampaign disbursements do not count toward a legislator's campaign spending limits. The remaining expenses were reported as campaign expenditures.<sup>14</sup>

Based upon the foregoing Findings of Fact, the undersigned panel of Administrative Law Judges makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judges are authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. A candidate or campaign committee is permitted to spend funds collected for political purposes on expenses that are reasonably related to the conduct of election campaigns, or for noncampaign disbursements, as defined in Minn. Stat. § 10A.01, subd. 26.<sup>15</sup> In addition, expenditures made for the purpose of providing information to constituents, whether or not related to the conduct of an election, are permitted expenses.<sup>16</sup>

3. Minn. Stat. § 211B.01, subd. 2, defines "campaign material" to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."<sup>17</sup>

4. Minn. Stat. § 211B.04, as amended in 2010, provides in relevant part, as follows:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the ..... committee, .....(address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for

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<sup>13</sup> Attachment to Complaint.

<sup>14</sup> Ex. D.

<sup>15</sup> Minn. Stat. § 211B.12.

<sup>16</sup> Minn. Stat. § 211B.12(7).

<sup>17</sup> Minn. Stat. § 211B.01, subd. 2; Minn. Laws 2004 ch. 293, art. 3 § 1.

by the ..... committee, .....(address), in support of .....(insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

(c) In the case of broadcast media, the required form of disclaimer is: "Paid for by the ..... committee."

(d) Campaign material that is not circulated on behalf of a particular candidate or ballot question must also include in the disclaimer either that it is "in opposition to .....(insert name of candidate or ballot question.....)"; or that "this publication is not circulated on behalf of any candidate or ballot question."

(e) This section does not apply to objects stating only the candidate's name and the office sought, fund-raising tickets, or personal letters that are clearly being sent by the candidate.

(f) This section does not apply to an individual or association who acts independently of any candidate, candidate's committee, political committee, or political fund and spends only from the individual's or association's own resources a sum that is less than \$2,000 in the aggregate to produce or distribute campaign material that is distributed at least seven days before the election to which the campaign material relates.<sup>18</sup>

5. The Respondent's Legislative Review is campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

6. The Respondent's Legislative Review substantially complied with the disclaimer requirement contained in Minn. Stat. 211B.04.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

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<sup>18</sup> Minn. Stat. § 211B.04; Minn. Laws 2010 ch. 397, § 15. The amendment is applicable to campaign material "prepared and disseminated" on or after June 1, 2010.

## ORDER

IT IS HEREBY ORDERED: The Complaint is DISMISSED.

Dated: November 1, 2010

s/Kathleen D. Sheehy  
KATHLEEN D. SHEEHY  
Administrative Law Judge

s/Beverly Jones Heydinger for  
BARBARA L. NEILSON  
Administrative Law Judge

s/Gary Hall  
GARY HALL  
Administrative Law Judge

## NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”<sup>19</sup> Campaign material is required, under Minn. Stat. § 211B.04(a) and (b),<sup>20</sup> to include a disclaimer identifying the name and address of the person or committee that prepared or disseminated the material.

The Respondent maintains that the 2010 Legislative Review is not campaign material disseminated for the purpose of influencing voting in an election, but was information provided to constituents about the last legislative session that did not require a disclaimer. She also argues that both the statutory definition of campaign material and the disclaimer requirement are unconstitutional.

The legislature provides some funding for legislators to mail informational material to constituents. If state funds are used to provide this service, the expense is not reportable under chapter 10A for purposes of determining compliance with spending limits. In addition, if a legislator uses personal funds for a constituent service, the expense is not reportable.<sup>21</sup> Finally, Minn. Stat. § 211B.12(7) permits a legislator to use campaign funds for the purpose of providing information to constituents.<sup>22</sup> In that event, the allocation of the

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<sup>19</sup> Minn. Stat. § 211B.01, subd. 2.

<sup>20</sup> Minn. Stat. § 211B.04; Minn. Laws 2004 ch. 293, art. 3, §§ 1 & 2.

<sup>21</sup> Minn. R. 4503.0950, subps. 1 & 2.

<sup>22</sup> Minn. Stat. § 211B.12(7).

expense is controlled by Minn. Stat. § 10A.01, subd. 26(6): If the expense is incurred during the legislative session, it may be considered a noncampaign disbursement; if incurred within 60 days of the end of the legislative session, only 50% may be considered a noncampaign disbursement.

The Campaign Finance & Disclosure Board is the entity with authority to determine whether a constituent services piece distributed by a legislator is properly reported as either a noncampaign disbursement or a campaign expense, for the purpose of determining compliance with the spending limits.<sup>23</sup> None of the Board's reporting requirements, however, control whether a particular written piece should also be considered campaign material that requires a disclaimer under Chapter 211B. The panel concludes that the categorization of written material as either a noncampaign disbursement or a campaign expenditure under Minn. Stat. § 10A is immaterial to the question whether it should properly be considered campaign material under Minn. Stat. ch. 211B; these classifications are not mutually exclusive.

Nor does the fact that Respondent's campaign committee paid for the printing and distribution of the document mean that it is necessarily campaign material. Minn. Stat. § 211B.12(7) allows legislators to use campaign funds for the purpose of providing information to constituents, even if the information is not related to the conduct of an election. To be considered campaign material, the material must be "disseminated for the purpose of influencing voting at a primary or other election."

In a previous case, this office concluded that a candidate's website that did not include the exact words required by § 211B.04, but did include the name and address of the campaign committee, substantially complied with the statute. In addition, the office concluded that a flyer inviting constituents to meet with a legislator was not campaign material because the meetings occurred during the legislative session and were paid for with legislative funds.<sup>24</sup>

This panel finds the reasoning in the above case compelling on the issue of whether the Respondent's Legislative Review is campaign material and whether it substantially complied with the disclaimer statute. The Legislative Review was distributed after the conclusion of the legislative session, at a time when the Respondent had declared her candidacy and had an opponent. Her campaign committee, not her legislative budget, paid for the printing and distribution costs. The Legislative Review was clearly designed in conjunction with her campaign website and highlights the themes of her campaign. It prominently identifies her campaign website as the way to contact her. Based on

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<sup>23</sup> See, e.g., Campaign Finance & Public Disclosure Board Advisory Opinion 294 (July 8, 1998) (publication of a candidate's message at Christmas time is not a constituent service, even if the candidate includes positions on a number of issues; it may not be reported as a noncampaign disbursement); Ethical Practices Board Advisory Opinion # 225 (Jan. 26, 1996) (the costs of an end-of-session report that includes a fundraising solicitation must be allocated between campaign expenditures and noncampaign disbursements on a reasonable basis).

<sup>24</sup> *In the Matter of the Campaign Complaint of Mastrud v. Ellison*, OAH 12-0320-16153-CV, Finding of No Probable Cause, Order of Dismissal (Sep. 21, 2004).

this evidence, the panel concludes it was disseminated for the purpose of influencing voting in the coming election.

That purpose is so clear, in fact, that the panel has concluded the material substantially complies with the disclaimer requirement. The address of the Respondent's campaign website ([www.kiffmeyer.org](http://www.kiffmeyer.org)) is prominently displayed at the bottom of the front page as the way to "connect with" the Respondent. The campaign website contains the disclaimer "Paid for by Mary Kiffmeyer Campaign." The only conclusion reasonably drawn is that the Respondent or her campaign committee disseminated the material.<sup>25</sup> For these reasons, the panel has determined that the Respondent substantially complied with the disclaimer requirement.

The public confusion that resulted after the flyer was distributed did not stem from questions about whether the Respondent or someone else had distributed the material, but rather whether the Respondent had used public funds to pay for it. Although the latter issue may affect the way in which the expense is properly reported to the Campaign Finance & Public Disclosure Board, it is not the focus of the disclaimer statute. The Respondent clearly took responsibility for disseminating the material, and the prominent reference to her campaign website on the front page is a sufficient acknowledgment, based on the record as a whole, that her campaign paid for it.

The record suggests that the Respondent was highly concerned about complying with the rules of the Campaign Finance & Public Disclosure Board, and she may have believed that attaching a disclaimer might preclude her from reporting half of the expense as a noncampaign disbursement. The panel concludes that the attachment of a disclaimer that is required under § 211B.04 should not affect in any way the allocation of the expense under chapter 10A.

The Respondent also argued that the definition of campaign material and the disclaimer requirements impermissibly infringe on the exercise of First Amendment rights. As a general rule, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face. An administrative law judge or an agency may properly consider, however, whether a statute is unconstitutional as applied to the particular facts of a case.<sup>26</sup> In *Buettner v. City of St. Cloud*,<sup>27</sup> the Minnesota Supreme Court stated that even when a constitutional issue is involved, the challenged determination of an administrative body may be due judicial deference if "the underlying decision-making process is designed to effectively produce a correct or just result of if the decision is informed by considerable expertise." To the extent that constitutionality, as applied, requires a generation of facts and findings within a

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<sup>25</sup> The Respondent has argued, in the alternative, that the Complainant named the wrong party because the Respondent's campaign committee, not the Respondent, paid for printing and disseminating the Legislative Review. Because the material did not contain a disclaimer in the format required by the statute, the Complainant cannot be faulted for naming the Respondent personally.

<sup>26</sup> G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).

<sup>27</sup> 277 N.W.2d 199, 204 (Minn. 1979).



particular subject matter area, administrative agencies may render a decision on a constitutional question which would be of assistance to a reviewing court.

Prior to 2004, campaign material was defined as any “literature, publication, or material tending to influence voting in a primary or other election.” In *Minnesota Citizens Concerned for Life, Inc. v. Kelley*,<sup>28</sup> the U.S. district court invalidated this definition on the ground that it was unconstitutionally vague because it failed to define a criminal offense with sufficient definiteness that ordinary people could understand what conduct was prohibited. The court concluded the statute did not turn on the purpose of the speaker, but rather on the effect the speaker’s communication had upon others.<sup>29</sup>

In response to *MCCL v. Kelley*, the legislature amended the definition of campaign material to mean, in material part, any “literature, publication, or material disseminated for the purpose of influencing voting in a primary or other election.”<sup>30</sup> In addition, Chapter 211B was amended to create an administrative process for hearing campaign complaints.<sup>31</sup> This administrative process is not a criminal proceeding.<sup>32</sup>

The Respondent argues, in reliance on *Federal Election Comm’n v. Wisconsin Right to Life*,<sup>33</sup> that this revised definition of campaign material suffers from the same constitutional flaw and is impermissibly vague. That case addressed Section 203 of the Bipartisan Campaign Reform Act of 2002, which made it a federal crime for any corporation to broadcast an “electioneering communication” that refers to a candidate for federal office within 30 days of a federal primary election or 60 days of a federal general election in which the candidate is running for office. The Supreme Court held that application of this “blackout period” to corporations seeking to make independent expenditures to broadcast issue-oriented advertisements was an impermissible violation of the First Amendment. To distinguish express advocacy (not permitted during a blackout period) from issue advocacy (permitted during a blackout period), the Court rejected a test based on the intent of the speaker and adopted an objective test, concluding that a court should find that an advertisement is the functional equivalent of express advocacy only if the advertisement is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

The panel sees no basis for concluding that *FEC v. WRTL* precludes application of the definition of “campaign material” to the 2010 Legislative Review at issue here. Moreover, there is no factual record to demonstrate that application of § 211B.01, subd. 2, to the Legislative Review will have the effect of chilling the Respondent’s speech. Because the panel has determined that the

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<sup>28</sup> 291 F.Supp.2d 1052 (D. Minn. 2003), *rev’d in part and remanded on other grounds*, 427 F.3d 1106 (8<sup>th</sup> Cir. 2005).

<sup>29</sup> 291 F.Supp.2d at 1067.

<sup>30</sup> Minn. Laws 2004, ch. 293, art. 3, § 2.

<sup>31</sup> Minn. Laws 2004, ch. 277, § 6.

<sup>32</sup> *Riley v. Jankowski*, 713 N.W.2d 379, 391 (Minn. App. 2006), *rev. denied* (Jul. 19, 2006).

<sup>33</sup> 551 U.S. 449 (2007).

Respondent substantially complied with the statutory disclaimer requirement, there is no reason to address the merits of the Respondent's arguments regarding the facial constitutionality of § 211B.04. The panel notes only that the U.S. Supreme Court has recently rejected both facial and as-applied challenges to federal disclaimer requirements on the basis that these statutes help citizens make informed choices in the political marketplace.<sup>34</sup>

K.D.S., B.L.N., G.H.

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<sup>34</sup> *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196 (2003) (precluding facial challenges); *Citizens United v. Federal Election Comm'n*, 558 U.S. at \_\_\_ (2010), slip op. at 51-56 (rejecting an as-applied challenge). See also *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (holding an Ohio statute, as applied to the petitioner, conflicted with the First Amendment right to speak anonymously).